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No.....

# In The Supreme Court

OF THE

## United States

OCTOBER TERM, 1984

TRANSCON LINES,
*Petitioner,*

VS.

MANCHESTER PRODUCTS COMPANY,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

**PETITION FOR WRIT OF CERTIORARI.**

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5 PP

## QUESTION PRESENTED.

Whether a promise by a regulated motor common carrier operating in interstate commerce to "automatically" honor claims of damage submitted to it by a shipper is a lawful and enforceable agreement in the face of the explicit prohibition against such agreements which is found in the Interstate Commerce Act.

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VS.

MANCHESTER PRODUCTS COMPANY,
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## PETITION FOR WRIT OF CERTIORARI.

### Opinions Below

The opinion of the Court of Appeals is a Memorandum opinion and has not been published. (A copy of the opinion is included at Appendix A(1), *infra*, pages 1-4.)

The opinion of the District Court for the Central District of California, denominated "*Judgment*" and the accompanying "*Findings of Fact and Conclusions of Law*," both dated July 13, 1983, are unreported. (Copies of the Judgment and Findings of Fact and Conclusions of Law are included at Appendices A(2) and A(3), *infra*, pages 5-10.)

*All of the parties to this proceeding are listed in the caption of this case. Petitioner Transcon Lines, Inc. has no subsidiary, parent nor affiliate.

## STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Ninth Circuit was dated, filed, and entered July 5, 1984. No petition for rehearing was filed. This Court has jurisdiction to review the judgment under 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

The statutes involved include the following: 49 U.S.C. §10761(a); Act of October 17, 1978, Public Law 95-473, Sec. 3; 49 C.F.R. §§1005 et seq. The pertinent text is set forth at Appendix B, *infra*, pp. 11-12.

## STATEMENT OF THE CASE

As alleged in the complaint, petitioner Transcon Lines (hereinafter "Transcon") is a common carrier by motor vehicle authorized as such by the Interstate Commerce Commission (hereinafter "ICC"). Transcon performed transportation services for defendant Manchester Products Company (hereinafter "Manchester"), and Manchester failed to pay for those services as required by the tariffs of Transcon on file with the I.C.C. The complaint also alleged that the action arose under an Act of Congress regulating commerce, namely 49 U.S.C. §§10741(a) and 10761(a) [formerly §§216(d) and 217(b) of the Interstate Commerce Act, 49 U.S.C. §316(d) and 317(b)]. Lastly, Transcon alleged that the district court had original jurisdiction pursuant to 28 U.S.C. §1337. The complaint sought freight charges and interest. (A copy of the complaint is included at Appendix C(1), *infra*, pp. 13-19.)

Manchester answered admitting it had not paid the carrier's charges. Manchester asserted, by way of an affirmative defense, that it had an offset based on damage to several dozen shipments assertedly caused by Transcon. (A copy of the answer to complaint is included at Appendix C(2), *infra*, pp. 20-22.)

In due course, the action was tried before the district court on May 13, 1983. At trial, Manchester asserted (and the trial court found) that Transcon had agreed to "automatically" honor any damage claim under $100 made by Manchester for damages to goods carried by Transcon.[1] Further, the court found that Transcon agreed to automatically take responsibility for any damage claim exceeding $100 if it failed to furnish Manchester with a written denial of liability for such claim within a reasonable time.

On May 14, 1983, the trial court entered judgment for Transcon on the entirety of its claim for freight charges while awarding offsetting damages to Manchester on its "counterclaim."[2]

Notwithstanding Transcon's assertion that 49 U.S.C. 10761(a) should govern, the trial court, in its Conclusions of Law, grounded its acceptance of Manchester's "counterclaim" on its own reading (not briefed by either party) of the ICC's claims rules set out at 49 C.F.R. §§1005 et seq.

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[1]For the purpose of this Petition, Transcon does not dispute the correctness of the trial court's finding that an employee of Transcon made such a promise.

[2]The trial court, *sua sponte*, transmuted the affirmative defenses articulated by the defendant into a "counterclaim." In order to streamline this petition, Transcon does not assail this unusual device.

## ARGUMENT

## THE JUDGMENT OF THE NINTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THIS COURT.[3]

Distilled to its essence, the question in this case is whether a promise by a regulated motor common carrier operating in interstate commerce to "automatically" honor claims of damage submitted to it by a shipper is in violation of explicit prohibitions against tariff-diminishing devices found in the Interstate Commerce Act.[4] This Court has previously held such agreements to be void and unenforceable. The Ninth Circuit now holds to the contrary. This Court should grant the writ sought in order to resolve a conflict which now exists between the opinion of the Ninth Circuit, below, and the decisions of this Court and those of every other Circuit that has ruled on the subject.

The Ninth Circuit's decision below is contrary to the language found in *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, ____ U.S. ____, 103 S.Ct. 1343 (1982), which states: " 'As to interstate shipments . . . the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation. . . .' A carrier's claim is, of necessity, predicated on the tariff — not

[3]For the second time in as many terms, this Court is called upon to review the Ninth Circuit's eccentric views of the non-discrimination provisions of the Interstate Commerce Act and to pass upon its penchant for overruling the decisions of this court. *See, Thurston Motor Lines v. Jordan K. Rand, Ltd.*, cited *infra*.

[4]49 U.S.C. § 10761(a) declares that "Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff. . . . That carrier may not charge or receive a different compensation . . . than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that offsets the value of that transportation or service, or another device."

an understanding with the shipper . . . " 103 S.Ct. at 1344.[5]

If the automatic claims payment "understanding" of the parties were to control here, then the whole purpose of the tariffs could easily be subverted by the simple expedient of unquestioning acceptance of the shipper's damage claims or inaction on the part of the carrier.

An example, using the basic facts of this case shows how easily the lawful tariff is rendered a nullity. Carrier's agent promises Shipper M two things: a) Carrier will automatically pay to Shipper M without dispute any damage claim under $100 submitted by Shipper M and, b) Carrier will automatically pay to Shipper M any damage claim over $100 that Carrier does not deny within 120 days. True to its word, Carrier automatically pays Shipper M $3,800 on seventy-one damage claims of under $100, and it simply fails within 120 days to dispute fifty-three damage claims over $100 totalling $14,900. Thus, Shipper M benefits in the amount of $18,700.00, deducting it from Carrier's freight charges which, on their face, comport with the lawful tariff on file with the I.C.C. Any other party looking at the freight charges and tariff would be unaware of the favored treatment afforded to Shipper M by the special agreement, yet unlawful discrimination has taken place.

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[5]The *Thurston* case dealt with the question of federal subject matter jurisdiction, but its language is apposite on just the issue now facing this Court, i.e. whether an understanding of the parties or the tariff is the enforceable agreement.

The Ninth Circuit attempts to justify its rather unique (and unprecedented) holding by suggesting that Transcon has not advanced sufficient proof to demonstrate its position. The Ninth Circuit misstates Transcon's position as follows:

> "Transcon's argument that the parties claim settlement agreement constitutes unreasonable discrimination[6] in favor of a particular customer fails for lack of proof . . . Transcon made no showing of the claim settlement procedure that it follows with others[7] [thus permitting an inference that Transcon will automatically honor claims for everyone]." (Appendix A(1), p. 2.)

The Ninth Circuit's rather adversarial position simply begs the question. Let us assume for the sake of argument that every other shipper with whom Carrier does business is given the same deal. The Ninth Circuit claims that no discrimination could exist without proof that other shippers were not treated equally. What this ignores is that the agreement to *automatically* pay damage claims fundamentally alters the published tariff. If the Ninth Circuit view were the law, 49 U.S.C. §10761(a) would be judicially amended to include the following language:

---

[6] Transcon never took the position that the automatic claims procedure was an "unreasonable discrimination." Transcon's position, sustained by the cases, is that payment of claims without respect to substantive merit is a *per se* violation of the Act. There is no "reasonable" way to fund a rebate.

[7] The Ninth Circuit's citation to *Continental Shipper's Association v. United States*, 328 F.2d 966 (9th Cir. 1964) is incomprehensible. That case merely stands for the proposition that a shipper's mere failure to pay a carrier's charges on time was not a violation of the Elkins Act. What is required for a *conviction* is the solicitation by the shipper of a concession or discrimination with an attendant advantage actually obtained. Those facts were not proved and the court properly reversed on the ground that the unilateral failure to pay is not the equivalent of a solicitation.

> "Notwithstanding anything contained in this or any other section of the Act, it shall be lawful for a carrier hereunder to charge less (or for that matter to charge more) than its rates contained in its tariffs on file with the Interstate Commerce Commission so long as its undercharges (or its overcharges as the case may be) are available to all."

It would be difficult to imagine an interpretation of the Act that would be more offensive to its Congressional purposes, to its historical antecedents, and to the economic realities of the marketplace. It makes no difference whether Transcon gave this preference to one shipper or to all. It still remains a *de facto* evasion of the lawful tariff. That was the holding in *Chicago & Alton Railroad Co. v. Kirby*, 225 U.S. 155, 164-165 (1912). In that case, the carrier had a special arrangement with the shipper whereby the carrier undertook to expedite a car load shipment of horses over its own line so that the horses would arrive at a point of connection with an interlining carrier in time to be carried by a special stock train leaving the next morning. The shipper was only charged the regular established through joint rate contained in a tariff which made no provision for such special expedited service. The carrier did not succeed in getting the horses to the interchange point in time for the special train. The shipper sued the carrier for a breach of the carrier's special agreement for expedited service. This court held that the shipper could not recover damages for breach of the special contract even though the shipper assertedly did not know that the established rates and schedules of the carrier made no provision for such special service.

Similarly, the Supreme Court in *Davis v. Cornwell*, 264 U.S. 560, 561-562 (1924) indicated that the *Alton* case had settled that a special contract is illegal when not provided for in the tariff. Justice Brandeis for the court in *Davis* stated that it is "not necessary to prove that preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference." The court added, "The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to [the shipper's] recovery."

Another of this Court's cases is useful to cite. In the case of *United States v. Braverman*, 373 U.S. 405, 406 (1963), this Court noted:

> "[The Elkins Act], first, makes it a misdemeanor for a carrier to fail 'strictly to observe' published tariffs and, second, goes right on to make it unlawful 'for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, discrimination' as to interstate shipments of property 'whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier***.' More unequivocal language would be hard to imagine. It strikes at any and every kind of rebate, no matter by whom or to whom given. . . .
>
> "The legislative history of the Elkins Act bears out the conclusion that Congress intended to prevent any kind of departure from the published rates . . ."

The arrangement approved by the Ninth Circuit would eviscerate the Act. This Court has never countenanced such a result.

## THE JUDGMENT OF THE NINTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The federal appellate courts have had no difficulty in finding devices such as the one sought to be used by Manchester to be an evasion of the non-discrimination provisions of the Interstate Commerce Act.

In the case of *United States v. Satuloff Bros.*, 79 F.2d 846 (2nd Cir. 1935), the Second Circuit dealt with a case in which the agent of a consignee of a shipment of turkeys filed a fraudulent claim against a carrier for merchandise alleged to be missing from the shipment through the fault of the carrier. In fact, the agent of the consignee had misappropriated the merchandise for his own use and sought to reduce the consignee's freight charges by filing a false claim. The consignees were convicted of violating the Interstate Commerce Act. In affirming, the court quoted from *Armour Packing Co. v. United States*, 209 U.S. 56 (1908) saying:

> " 'The substance of this offense is not the device, but solicitation or receipt of the concession and the transportation thereby affected. It may be committed whether the concession is induced by a fraudulent or an honest device, by a shrewd or a simple one, by a secret or an open one. The true meaning of the phrase 'by any device whatever' . . . was to emphasize the scope of the law so that is would clearly include the solicitation or receipt of every concession, however obtained, whereby property in interstate or foreign commerce should be transported at less than the regular filed and published rate.' " 79 F.2d 846, 849-850.

*Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979), finds the Seventh Circuit quoting from the Supreme Court case of *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922), as follows:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."

In *Aero Trucking, supra*, the carrier sued the shipper for its tariff charges for the transportation of steel tubing. One of the components of the carrier's charges was for the use of its trailers past the "free time." This type of charge is commonly called a detention or delay charge. The shipper counter-claimed for fraud alleging that the carrier's employee had promised that there would be no detention charges for trailers kept past the free time. The trial court granted summary judgment to the carrier on both its claim for freight charges and as against the shipper's claim for fraud. the Seventh Circuit, not surprisingly, affirmed.

The Eighth Circuit, in *Chicago, B. & Q. R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263 (8th Cir. 1973), dealt with a case in which the carrier made an agreement with the shipper to accept lesser switching charges than permitted by the tariff in exchange for shipper's support for a proposed application for modification of tariff charges and its payment of increased hauling charges. The carrier did not file the application as agreed, and brought an action against the shipper for collection of the full switching charges under the tariff. The circuit court affirmed the lower court's award to the carrier. In so doing, it said that

a tariff bound both the carrier and the shipper with the force of law and that the parties could not attach non-statutory conditions to collection of the tariff rates. It went on to say that under the statute, courts may not permit the tariff to be changed or waived whether it be by agreement of the parties, failure to carry out that agreement, or even by stipulation in court.

Even the Ninth Circuit, in the case of *Consolidated Freightways Corporation v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir. 1980) cert. den. 447 U.S. 907 (1980) held that no defense or counterclaim to a carrier's action for unpaid charges under a lawful tariff can be predicated on a carrier's alleged *fraudulent* misquotation of tariffs.

The cases just referred to are merely the tip of the iceberg. Every Circuit has ruled that devices to avoid the non-discrimination portions of the Act may not be given legal effect.

## THE NINTH CIRCUIT ERRONEOUSLY DETERMINED THAT THE "AGREEMENT" OF THE PARTIES WAS CONSISTENT WITH THE I.C.C. CLAIMS REGULATIONS

The Ninth Circuit opined that "both aspects of the claims settlement agreement are reasonable and compatible with the I.C.C. regulations." Appendix A(1), p. 3. This position is one hundred and eighty degrees out of phase with what the Commission itself said in the rule-making proceeding which gave rise to the claims regulations. Indeed, a look at *In re Loss and Damage Claims*, 340 I.C.C. 515, 529 (1972), finds the Commission itself repudiating the very thing that the court below would permit. The Commission addresses the central issue in this case as follows:

"In *Phillips v. Grand Trunk Ry.*, 236 U.S. 662 (1915), the Supreme Court stated, at page 667, that 'the prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier.'

"Although the court there was addressing itself to the matter of the proper rate to be charged on a shipment transported by rail carrier subject to Part I of the Act, . . . the underlying principle is equally applicable to claims matters. [Citations]. It was also impliedly found by Division 2, in *Arma Corp. v. M & M Transp.*, 61 M.C.C. 723 (1953), to be applicable to motor carriers subject to Part II of the act, and we can see no reason why the same logic should not hold true for other regulated carriers and the application of the concept to loss and damage claims. From a regulatory standpoint, therefore, *we are also concerned that a rebate may be clandestinely granted by a carrier by the simple expedients of readily accepting a claimant's arguments in support of a claim, of consenting to a default judgment, of waiving available defenses*, or even of failing to prosecute appeals when there is a reasonable basis for expecting to be successful if pursued. . . ." (Emphasis added.)

The Commission focused on the obvious fact that a well-timed *"mea culpa"* uttered by a carrier is an excellent device for evading the non-discrimination provisions of the Act. In the words of the Commission, "We are also concerned that a rebate may be clandestinely granted by a carrier by the simple expedient of [automatically] accepting a claimant's arguments in support of a claim. . . ." No one who has a passing familiarity with

utility rate regulation could possibly mistake the purported "agreement" between Transcon and Manchester as anything other than a prohibited agreement to evade the Act. The Act does not permit and the I.C.C. regulations do not condone the payment of claims unless there is a studied and rational determination on the part of the carrier that the asserted claims have merit in fact.

## PERMITTING SHIPPERS AND RECEIVERS OF FREIGHT TO RAISE A SPECIAL AGREEMENT AS A DEFENSE TO A CARRIER'S SUIT TO RECOVER ITS CHARGES WILL PROMOTE EVASIONS OF THE ACT AND FRAUD

It is a truism that whenever an exception is created to an otherwise strict statutory scheme, parties flock to put themselves under the protective umbrella of that exception. In simple words, no matter what the facts are, the pleadings will allege whatever facts amount to the exception. The Ninth Circuit's eccentric handling of this matter has generated precisely that result. In the recently filed case of *ABF Freight System, Inc. v. Manchester Products, Inc.*, U.S.D.C. Central District of California case number CV-83-3576-LAW, Manchester, the respondent herein and defendant there, has raised the identical issue in avoidance of the carrier's charges. Attached as Appendix D is the proposed Pre-Trial Conference Order in that case. The "automatic" claims approval issues are raised at paragraphs 8 and 9 of that pre-trial conference order. (App. D, p. 25).

In yet another recently filed case, namely *Manchester Products Company v. Transcon Lines*, Municipal Court of the Los Angeles Judicial District, case number G30568, Manchester has gone on the offensive with the Ninth Circuit's decision and has sued Transcon for fraud for failure to comply with its "automatic" claims filing rules.

Attached as Appendix E is a true and correct copy of the complaint in that case. Equipping the customers of carriers with the right to plead a special contract as a defense to a carrier's suit for its charges would cause the very harm which the Act is designed to prevent.

## CONCLUSION

For the foregoing reasons, petitioner prays that the writ be issued so that the judgment below may be reversed. It is respectfully suggested that summary reversal is appropriate under Supreme Court Rules, Rule 23.1 as was the case in *Thurston Motor Lines, supra.*

Respectfully submitted,
GARFIELD, TEPPER & ASHWORTH
A PROFESSIONAL CORPORATION

CHRISTOPHER ASHWORTH
*Attorneys for Petitioner*

## APPENDIX A(1)

**Memorandum**

No. 83-6129

DC#CV82-2740-CHH

In the United States Court of Appeals
for the Ninth Circuit

Transcon Lines,
a corporation,
Plaintiff-Appellant,

vs.

Manchester Products Company,
a California corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
District Judge Cynthia H. Hall, Presiding
[Argued and submitted June 5, 1984]

Before: WRIGHT, FERGUSON, and REINHARDT, Circuit Judges.

Transcon Lines, a common carrier, performed transportation services for Manchester Products. Transcon agreed to pay automatically all damage claims received from Manchester for less than $100. Transcon assumed responsibility for investigating all other claims, agreeing to pay them if it did not deny liability within a reasonable time.

When Transcon sued for $18,980.08 in charges due, Manchester claimed a setoff of $18,245.03 for damage to cargo shipped. The district court enforced the parties' damage claim settlement agreement, allowing the setoff and entering judgment for Transcon for $735.05.

## I.

## LIABILITY BASED ON CLAIM SETTLEMENT AGREEMENT

The Interstate Commerce Act prohibits a carrier charging or receiving a rate different from that specified in the published tariff, "whether by returning a part of that rate to a person, giving a person a privilege, . . . or another device." 49 U.S.C. §10761(a) (1982). The Act also prohibits unreasonable discrimination by a carrier in the rates that it charges or receives from its customers for similar services. 49 U.S.C. §10741 (1982).

The ICC has promulgated regulations governing processing of claims of damage to property transported in interstate commerce by common carriers. A carrier must acknowledge the receipt of claims and promptly investigate them. 49 C.F.R. §§1005.3(a), 1005.4 (1983). The carrier must "pay, decline, or make a firm compromise settlement offer in writing to the claimant within 120 days after receipt of the claim by the carrier." 49 C.F.R. §1005.5(a) (1983).

Transcon's argument that the parties' claim settlement agreement constitutes unreasonable discrimination in favor of a particular customer fails for lack of proof. To establish discrimination, a deviation from the treatment normally accorded other shippers must be shown. *Continental Shippers' Association v. United States*, 328 F.2d 966, 968 (9th Cir. 1964). Transcon made no showing of the claim settlement procedure that it follows with others.

Neither is the agreement an unjustified deviation from the tariff. Transcon agreed to pay claims under $100 automatically because it would cost more to investigate them. Transcon could have settled each claim individually for that reason. *See* 49 C.F.R. §1005.5(a). We do not

infer fraud or subterfuge simply from explicit adoption of that policy.

Under the parties' agreement, liability on the claims of at least $100 results from Transcon's failure to respond to the claims within a reasonable time. The ICC regulation requires a definite response to a claim within 120 days. *Id.* Neither party contends that a "reasonable time" is less than 120 days.

Both aspects of the claim settlement agreement are reasonable and compatible with the ICC regulations.

## II.

## PROOF OF CLAIMS

Under the agreement, Manchester was required to submit claims to Transcon. Manchester did so. Transcon did not dispute the evidence that supporting documents were also submitted. Manchester presented at trial accounting entries showing payments made to its customers to satisfy the claims. The district court's conclusion that the claims were submitted to Transcon pursuant to and in compliance with the settlement agreement was supported by the evidence.

## III.

## CONSIDERATION OF SETOFF AS A COUNTERCLAIM

To the extent that the damage claims were based on the same transactions as the freight charges, they were compulsory counterclaims. Fed. R. Civ. P. 13(a). A party who fails to plead a compulsory counterclaim has waived that claim and is barred from bringing suit on it by res judicata. *Baker v. Southern Pacific Transportation*, 542

F.2d 1123, 1126 (9th Cir. 1976). We find no abuse of discretion in the district judge's treatment of the mistakenly designated setoff defense as a counterclaim, in the interest of justice. *See* Fed. R. Civ. P. 8(c).

Transcon's loss of the opportunity to plead its defenses to setoff was not prejudicial. Evidence of any defenses available to Transcon would have been relevant at the trial. The pretrial order provided that "whether or not there has been any damage to the goods" was an issue of fact to be litigated. Transcon had a fair opportunity to litigate the issue of the damage claims.

The judgment is AFFIRMED.

## APPENDIX A(2)

**Judgment**
No. CV 82-2740-CHH

United States District Court
Central District of California

Transcon Lines,
a corporation,
Plaintiff,

v.

Manchester Products Co.,
a California corporation,
Defendant.

This action was tried before the Court on May 13, 1983. The Court has considered the pleadings on file in this case, the evidence adduced at trial, and the briefs submitted by the parties.

IT IS HEREBY ORDERED that judgment be entered for plaintiff in the amount of $18,980.08.

IT IS FURTHER ORDERED that judgment be entered for defendant, on its counterclaim, in the amount of $18,245.03.

This Judgment is based upon the Findings of Fact and Conclusions of Law filed herewith.

Dated: July 13, 1983.

/s/Cynthia Holcomb Hall
CYNTHIA HOLCOMB HALL
UNITED STATES DISTRICT JUDGE

## APPENDIX A(3)

**Findings of Fact and Conclusions of Law**
No. CV 82-2740-CHH

United States District Court
Central District of California

Transcon Lines,
a corporation,
Plaintiff,

v.

Manchester Products Co.,
a California corporation,
Defendant.

The judgment in favor of plaintiff Transcon Lines is based upon the Findings of Fact and Conclusions of Law set forth below:

### FINDINGS OF FACT

1. Plaintiff Transcon Lines ("Transcon") is a common carrier by motor vehicle, and is subject to the rules and regulations of the Interstate Commerce Commission applicable to carriers engaged in interstate commerce.

2. Defendant Manchester Products Co. ("Manchester") is a corporation engaged in the manufacture of plastic extrusions.

3. Between the approximate dates of October 1, 1981, and February 8, 1982, Transcon performed transportation services for Manchester. The services consisted of the transportation of goods by motor vehicle moving in interstate commerce. The charge for these services, as determined by the applicable tariff, aggregate $18,980.08, which sum is due and payable to the plaintiff.

4. Manchester filed a number of written claims for damage to cargo on a number of different shipments. These claims aggregate $18,245.03.

5. In or about December 1981, Gordon McKenzie, an agent of Transcon, made an agreement with Manchester whereby Transcon agreed to automatically honor any claim under $100 made by Manchester for damages to goods carried by Transcon. Transcon also promised to investigate any damage claim exceeding $100, and, if it failed to deny liability for such claims within a reasonable time, take responsibility for them.

6. Manchester presented a number of written claims for loss or damage to Transcon after December 1981. Seventy-one claims of $100 or less were presented in an aggregate amount of $3,782.13. Fifty-three claims exceeding $100 were presented in an aggregate amount of $14,872.30. Five credits were presented in an aggregate amount of $409.40. The total aggregate amount of claims and credits presented is $18,245.03.

7. Transcon did not pay, decline to pay, make a firm compromise settlement offer, or respond in any other way to Manchester's damage claims.

8. Any Conclusion of Law deemed to be a Finding of Fact is incorporated herein.

## CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is incorporated herein.

2. Subject matter jurisdiction is established under 28 U.S.C. §1337.

3. Manchester owes Transcon the sum of $18,980.08 for transportation services performed between the dates of October 1, 1981, and February 8, 1982.

4. Setoff for damages incurred in shipment is not a defense to nonpayment for transportation services. Damage claims may, however, serve as the basis for a counterclaim. *See Chicago & N.W. Rwy. Co. v. Lindell*, 281 U.S. 14, 50 S. Ct. 200 (1930); *In re Penn Central Trans. Co.*, 477 F.2d 841 (1973). Although Manchester erroneously pleaded setoff as an affirmative defense, the issue may be considered by the Court as a counterclaim. Fed. R. Civ. P. 8(c).

5. The Interstate Commerce Act provides that:

> [A] carrier may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. §10761(a).

The Act also provides that a carrier may not unreasonably discriminate between different customers by charging a different compensation, by using a special rate, rebate, drawback, or another means. 49 U.S.C. §10741.

6. The Interstate Commerce Act's proscription of unreasonable discrimination is applicable to matters involving claims for lost or damaged merchandise. *See Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims*, 340 I.C.C. 515, 529 (1972). The Interstate Commerce Commission ("ICC") has promulgated regulations that govern the processing of claims for loss, damage, injury, or

delay to property transported in interstate commerce by common carriers. 37 Fed. Reg. 4258 (1972), *amended by* 37 Fed. Reg. 20943 (1972), 37 Fed. Reg. 23909 (1972), 41 Fed. Reg. 25908 (1976), 46 Fed. Reg. 16224 (1981), *codified at* 49 C.F.R. Part 1005 (1982). These regulations must be followed by shippers seeking to recover for loss or damages alleged to result from shipment. *See* 49 C.F.R. §1005.2(a).

7. Applicable regulations require a carrier to acknowledge the receipt of proper claims and promptly investigate them. *See* 49 C.F.R. §§1005.3(a), 1005.4. The carrier is then obligated to "pay, decline, or make a firm compromise settlement offer in writing to the claimant within 120 days after receipt of the claim by the carrier. . . ." *Id.* §1005.5(a).

8. The evidence presented at trial established that Transcon agreed to (1) "automatically" pay all damage claims of less than $100 and (2) assume responsibility for investigating any claim in excess of $100 and, if it failed to deny liability for them within a reasonable time, take responsibility for such claims. This agreement is compatible with the damage claims procedures established by the regulations contained in 49 C.F.R. Part 1005. Upon presentation of a proper written claim, the carrier has the burden of acknowledging, investigating, and disposing of the claim.

9. Manchester is entitled to recover on the damage and loss claims submitted in the amount of $18,245.03.

10. After setting off the claim and counterclaim, Transcon is entitled to payment in the sum of $735.05.

11. Each party is to bear its own attorney's fees and costs of suit.

Dated: July 13, 1983.

/s/ Cynthia Holcomb Hall
CYNTHIA HOLCOMB HALL
United States District Judge

## APPENDIX B

### 49 U.S.C. §10761(a)

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title [49 USCS §§1050 et seq.] shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter [49 USCS §§10761 et seq.]. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

### 49 C.F.R. §1005.3(a)

Each carrier shall, upon receipt in writing . . . of a proper claim in the manner described in the regulations, acknowledge the receipt of such claim in writing or electronically to the claimant within 30 days after the date of its receipt by the carrier unless the carrier shall have paid or declined such claim in writing or electronically within 30 days of the receipt thereof. The carrier shall indicate in its acknowledgment what, if any, additional documentary evidence or other pertinent information may be required by it further to process the claim as its preliminary examination of the claim, as filed, may have revealed.

49 C.F.R. §1005.4(a)

*Prompt Investigation Required.* Each claim filed against a carrier in the manner prescribed herein shall be promptly and thoroughly investigated if investigation has not already been made prior to receipt of the claim.

49 C.F.R. §1005.5(a)

Each carrier subject to the Interstate Commerce Act which receives a written or electronically transmitted claim for loss or damage to baggage or for loss, damage, injury, or delay to property transported shall pay, decline, or make a firm compromise settlement offer in writing or electronically to the claimant within 120 days after receipt of the claim by the carrier; provided, however, that if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier shall at that time and at the expiration of each succeeding 60-day period while the claim remains pending, advise the claimant in writing or electronically of the status of the claim and the reason for the delay in making final disposition thereof. . . .

## APPENDIX C(1)

**Complaint for Freight Charges**

No. CV-82-2740-CHH(JR.)

United States District Court
Central District of California

Transcon Lines,
a corporation,
Plaintiff,

v.

Manchester Products, Co.,
a California corporation,
Defendant.

Plaintiff alleges as follows:

1. This action arises under an Act of Congress regulating commerce, namely 49 U.S.C. §§10741(a) and 10761(a) [formerly §§216(d) and 217(b) of the Interstate Commerce Act, 49 U.S.C. §§316(d) and 317(b)]. This claim arises from a common carrier's charges for interstate transportation of property. This court has original jurisdiction in this cause pursuant to 28 U.S.C. §1337.

2. Plaintiff is a corporation incorporated under the laws of the State of California.

3. Defendant is a California corporation, doing business within this district.

4. Plaintiff is a common carrier by motor vehicle, authorized as such by the Interstate Commerce Commission, and is authorized to transport general commodities between places in the United States.

5. Between the dates of August 13, 1981 and February 19, 1982, plaintiff performed transportation services for defendant, all as is set forth in the abstract of Bills of Lading attached hereto as Exhibit "A" and hereby made a part hereof.

6. Plaintiff has not recovered its full lawful charges for the aforesaid services as set forth in its tariffs on file with the Interstate Commerce Commission.

7. The full amount of plaintiff's lawful charges which is uncollected is $18,980.08.

8. Defendant has refused to pay plaintiff its full lawful charges, and indeed has paid nothing at all.

9. Plaintiff has been damaged in the foregoing premises in the amount of $18,980.08.

WHEREFORE, plaintiff prays:

1. For the recovery of plaintiff's full lawful charges in the amount of $18,980.08;

2. For interest from the date of such rendition of transportation services herein until payment;

3. For costs of suit incurred herein; and

4. For such other and further relief as is just in the premises.

Dated: June 1, 1982.

GARFIELD, TEPPER & ASHWORTH
A Professional Corporation
By Christopher Ashworth
CHRISTOPHER ASHWORTH
*Attorneys for Plaintiff*
*Transcon Lines*

# STATEMENT
# FOR
# MANCHESTER PRODUCTS

**Exhibit A-1**

| F/B Date | F/B No. | F/B Amt. |
|---|---|---|
| 11/18/81 | 137 063138 | 207.32 |
| 10/20/81 | 077 311058-AA | 67.05 |
| | 077 311058-AB | 17.70 |
| | AC | 19.54 |
| | AE | 87.57 |
| | AF | 17.70 |
| | AH | 23.40 |
| | AI | 17.70 |
| | AM | 25.70 |
| | AN | 17.70 |
| | BD | 17.70 |
| | BE | 60.93 |
| | CA | 33.92 |
| | CC | 215.43 |
| | CD | 246.40 |
| | CE | 724.60 |
| 10/22/81 | 077 311066 | 3056.27 |
| 10/21/81 | 077 311066-AA | 17.70 |
| | AC | 56.83 |
| | AE | 78.53 |
| | AK | 43.70 |
| | AL | 55.63 |
| | AM | 46.49 |
| | AN | 49.36 |
| | AO | 88.03 |
| | AP | 54.60 |
| | AQ | 47.60 |
| | AS | 41.78 |
| | AT | 40.46 |
| | AU | 38.10 |
| | AV | 51.45 |
| | AZ | 38.87 |
| | BA | 101.19 |
| | BB | 45.60 |
| | BC | 53.42 |
| | BD | 49.24 |
| | BF | 44.16 |
| | BG | 45.47 |
| | BH | 59.66 |
| | BI | 50.55 |
| 10/21/81 | 077 311066-BJ | 59.89 |
| | BK | 49.17 |
| | BL | 36.68 |

(Continued)

# ST .TEMENT
# FOR
# MANCHESTER PRODUCTS

| F/B Date (Continued) | F/B No. | | F/B Amt. |
|---|---|---|---|
| | | BM | 88.13 |
| | | BN | 48.73 |
| | | BO | 57.21 |
| | | BQ | 44.86 |
| | | BR | 37.97 |
| | | BS | 38.73 |
| | | BT | 40.18 |
| | | BU | 33.59 |
| | | BV | 65.99 |
| | | BW | 17.70 |
| | | BX | 37.40 |
| | | BY | 77.51 |
| | | BZ | 52.08 |
| | | CA | 37.40 |
| | | CB | 37.40 |
| | | CD | 36.68 |
| | | DA | 83.48 |
| | | DB | 30.13 |
| | | DD | 49.16 |
| | | DE | 24.30 |
| | | EB | 54.91 |
| | | ED | 55.63 |
| 10/28/81 | 077 311457 | | 3824.71 |
| | | AA | 67.14 |
| | | AB | 29.55 |
| | | AC | 32.89 |
| | | AD | 18.50 |
| | | AE | 62.38 |
| | | AJ | 54.86 |
| | | AK | 17.70 |
| | | BC | 17.70 |
| | | BD | 17.70 |
| | | BE | 19.36 |
| | | BG | 62.61 |
| | | BI | 18.63 |
| | | BJ | 17.70 |
| | | CB | 17.70 |
| | 077 311457- | CD | 57.20 |
| | | CE | 52.00 |
| | | CG | 42.32 |
| | | CH | 25.61 |
| | | CO | 41.70 |
| | | CR | 44.39 |
| | | CS | 17.70 |
| | | CT | 17.70 |

(Continued)

# STATEMENT
# FOR
# MANCHESTER PRODUCTS

| F/B Date (Continued) | F/B No. | F/B Amt. |
|---|---|---|
| | CY | 16.38 |
| | DB | 35.79 |
| | DD | 17.70 |
| | DE | 21.27 |
| | EA | 35.72 |
| | EB | 38.28 |
| | ED | 36.13 |
| | EG | 53.00 |
| 11/4/81 | 077 311827 | 3316.05 |
| 11/13/81 | 077 311872-AA | 60.26 |
| | AB | 73.59 |
| | AC | 53.79 |
| | AD | 17.89 |
| | AE | 17.70 |
| | BA | 58.97 |
| | BE | 17.70 |
| | BF | 58.08 |
| | BG | 32.78 |
| | CA | 66.92 |
| | CB | 61.66 |
| | CC | 65.76 |
| | CD | 79.49 |
| | CE | 71.66 |
| | CF | 79.24 |
| | CG | 80.02 |
| | CH | 30.45 |
| | CJ | 45.51 |
| | CL | 46.61 |
| | CM | 45.33 |
| | CN | 42.81 |
| | CO | 41.24 |
| | CP | 87.77 |
| 11/3/81 | 077 311827-CQ | 17.70 |
| | CR | 17.70 |
| | DA | 63.21 |
| | DB | 30.73 |
| | DC | 122.05 |
| | DD | 44.87 |
| | EA | 68.56 |
| | EB | 26.43 |
| | EC | 51.62 |
| | ED | 36.22 |
| | EE | 41.15 |
| | EF | 67.14 |
| | EG | 40.44 |

(Continued)

# STATEMENT
# FOR
# MANCHESTER PRODUCTS

| F/B Date (Continued) | F/B No. | F/B Amt. |
|---|---|---|
| | EH | 48.83 |
| | EI | 52.00 |
| | EJ | 41.58 |
| | EK | 36.22 |
| | EL | 81.33 |
| | EM | 50.25 |
| | EN | 40.69 |
| | EO | 40.14 |
| | EP | 38.63 |
| | EQ | 53.44 |
| | ER | 56.43 |
| | ES | 62.38 |
| | ET | 53.26 |
| | EU | 44.75 |
| | EV | 36.22 |
| | EW | 67.80 |
| | EX | 36.22 |
| | EY | 41.78 |
| | EZ | 64.63 |
| | FA | 17.70 |
| | FB | 46.23 |
| | FC | 37.87 |
| | FD | 37.82 |
| | FE | 34.16 |
| | FG | 37.40 |
| | FH | 37.39 |
| | FI | 90.46 |
| 11/6/81 | 077 311827-FJ | 102.96 |
| | FK | 43.83 |
| | FL | 43.70 |
| 2/19/82 | 033 141514 | 76.14 |
| 8/13/81 | 077 307100-CA | 82.01 |
| | Statement total | $18,980.08 |

## APPENDIX C(2)

**Answer to Complaint**
Case No. CV 82 2740 CHH

United States District Court
Central District of California

Transcon Lines,
a corporation,
Plaintiff,

vs.

Manchester Products Co.,
a California corporation,
Defendant.

Defendant, MANCHESTER PRODUCTS, CO. ("MANCHESTER"), for itself and no other, responds to plaintiff's Complaint (the "Complaint") by admitting, denying and alleging as follows:

1. Answering the allegations set forth in paragraph 2 of the Complaint, MANCHESTER has no knowledge or information sufficient to form a belief as to the truth of said allegations and, based thereon, generally and specifically denies the same.

2. Answering the allegations set forth in paragraph 4 of the Complaint, MANCHESTER has no knowledge or information sufficient to form a belief as to the truth of said allegations and, based thereon, generally and specifically denies the same.

3. Answering the allegations set forth in paragraph 5 of the Complaint, MANCHESTER has no knowledge or information sufficient to form a belief as to the truth of said allegations and, based thereon, generally and specifically denies the same.

4. Answering the allegations set forth in paragraph 6 of the Complaint, MANCHESTER has no

knowledge or information sufficient to form a belief as to the truth of said allegations and, based thereon, generally and specifically denies the same.

5. Answering the allegations set forth in paragraph 7 of the Complaint, MANCHESTER has no knowledge or information sufficient to form a belief as to the truth of said allegations and, based thereon, generally and specifically denies the same.

6. Answering the allegations set forth in paragraph 8 of the Complaint, MANCHESTER admits that it has not paid the sum referred to therein and alleges that it has not done so because it has an offset against plaintiff in an amount equal or greater to said sum.

7. Answering the allegations set forth in paragraph 9 of the Complaint, MANCHESTER denies the same.

## FIRST AFFIRMATIVE DEFENSE

8. MANCHESTER has an offset against plaintiff in an amount equal or greater to $18,980.08 for damages caused to MANCHESTER's merchandise by plaintiff's negligent handling of the same when plaintiff was transporting said merchandise.

WHEREFORE, MANCHESTER prays the Court for judgment as follows:

1. That plaintiff take nothing by way of its Complaint;

2. That MANCHESTER be reimbursed for its costs of suit incurred herein; and

3. For such other and further relief as is just and appropriate.

RAISKIN & REVITZ
A Partnership of
Professional Corporations

By: _____
STEVEN J. REVITZ
*Attorneys for Defendant*
*Manchester Products, Co.*

## APPENDIX D

**Pre-Trial Conference Order**
No. CV-83-3576-LEW(Px)

United States District Court
Central District of California

ABF Freight System, Inc.,
Plaintiff,

vs.

Manchester Products, Inc.,
Defendant.

And Related Counter-Claim

Following pre-trial proceedings, pursuant to Rule 16 F.R.C.P. and Local Rule 9, it is ordered:

1. This is an action for the plaintiff common carrier's charges for interstate transportation of property and a counter-claim by the defendant for damage to freight.

2. The parties are:

(a) ABF Freight System, Inc.; and

(b) Manchester Products, Inc.

Each of these parties has been served and has appeared. All other parties named in the pleadings and not identified in the preceding paragraph are now dismissed.

3. The pleadings which raise the issues are: The complaint of ABF Freight System, Inc. (hereinafter "ABF"), the answer of Manchester Products, Inc. (hereinafter "Manchester"), the counter-claim of Manchester, and ABF's answer to the counter-claim. Federal jurisdiction and venue were invoked by ABF

on the grounds that the action arises under an act of Congress regulating commerce, namely 49 U.S.C. §11707. The court has original jurisdiction of this cause pursuant to 28 U.S.C. §1337. Both plaintiff and defendant are present within this district.

4. The trial is estimated to take one trial day.

5. The trial is to be non-jury.

6. The following facts are admitted and require no proof:

(a) ABF is a corporation incorporated under the laws of the State of California;

(b) Manchester is a corporation incorporated under the laws of the State of California with its principle place of business within this district;

(c) ABF is a common carrier by motor vehicle authorized as such by the Interstate Commerce Commission and is authorized to transport general commodities between places in the United States;

(d) Between the approximate dates of October 1, 1981 and February 8, 1982, ABF performed transportation services for Manchester in interstate commerce. The proper charges for the said transportation aggregates $39,076.93, none of which has been paid, and which is all due and payable — albeit, subject to any counter-claim which the defendant ABF may prove in this litigation;

(e) Defendant Manchester has filed with ABF claims for damage to cargo on 89 different shipments. Copies of the claims will be submitted under separate cover. It is conceded by the parties that if injury in fact has been done to the goods in question with respect to the 89 claims filed, the

damage amounts on each claim are correct. The claims aggregate $25,000.

7. The following facts, though stipulated, shall be without prejudice to any evidentiary objection: None.

8. The following issues of fact, and no others, remain to be litigated at the trial:

(a) Whether or not any employee of ABF informed defendant Manchester that ABF would automatically honor any claim under $100.00;

(b) Whether any employee of ABF informed Manchester that any claim filed above $100.00 would be absorbed by ABF if not investigated and declined within a certain period of time;

(c) With respect to each and every of the 89 claims filed by Manchester, whether or not there has been any damage to the goods.

9. The following issues of law, and no others, remain to be litigated at trial:

(a) Whether or not a purported promise by an employee of a common carrier operating in interstate commerce pursuant to operating authority issued by the Interstate Commerce Commission to "automatically" pay all claims under $100.00 is enforceable against the carrier;

(b) Whether a purported promise made by a carrier described in the paragraph next preceding, to the effect that it will absorb all claims over $100.00 if not investigated and declined within a certain period of time is enforceable against that carrier.

10. All discovery is complete.

11. A joint exhibit list of the parties will be filed under separate cover.

12. A joint witness list of the parties will be filed under separate cover.

13. Each party intending to present deposition testimony has marked such depositions in accordance with Local rule 9.4.9. For this purpose, the following depositions are filed with this court: None.

14. The following law and motion matters are pending or contemplated: Plaintiff ABF's motion for summary adjudication regarding the enforceability of its purported "promise" to automatically honor claims.

15. Bifurcation of the following issues for trial is ordered: None.

16. The foregoing admissions, having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this pre-trial conference order shall supersede the pleadings and govern the course of the trial of this case unless modified to prevent manifest injustice.

Dated: _____

_____

United States District Judge

APPROVED AS TO FORM AND CONTENT:

CHRISTOPHER ASHWORTH,
Member of
GARFIELD, TEPPER &
ASHWORTH
A Professional
Corporation

Dated: _____

CHRISTOPHER ASHWORTH

STEVEN J. REVITZ, Member of
RAISKIN & REVITZ

Dated: _____

STEVEN J. REVITZ

## APPENDIX E

Case No. G30568

**Complaint For:**
**1. Negligence;**
**2. Breach Of Contract; and**
**3. Fraud.**

Municipal Court of the Los Angeles Judicial District
for the County of Los Angeles, State of California

Manchester Products Company,
a California corporation,
Plaintiff,

vs.

Transcon Lines a
California corporation,
and Does 1 through 50,
Defendants.

### FIRST CAUSE OF ACTION

For a first cause of action against defendants, and each of them, plaintiff alleges:

1. At all times herein mentioned, plaintiff was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California.

2. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, defendant Transcon Lines ("Transcon"), was, and now is, a corporation organized and existing under and by virtue of the laws of the State of California and transacting business in the County of Los Angeles, State of California.

3. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, Transcon

has been a common-carrier by motor vehicle, authorized as such by the Interstate Commerce Commission, and authorized to transport general commodities between places in the United States.

4. Plaintiff is unaware of the true names and capacities, whether individual, corporate, associate of otherwise, of defendants named herein as Does 1 through 50 and therefore sues such defendants by such fictitious names. Plaintiff will ask leave of Court to amend this Complaint to state the true names and capacities of said defendants when the same have been ascertained.

5. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, defendants, and each of them, were the agents, servants, employees, representatives, partners, joint venturers and/or alter-egos of each other and, at all times herein mentioned, were acting within their scope and capacity as such agents, servants, employees, representatives, partners, joint venturers and/or alter-egos.

6. In or about late March, 1983, Manchester contracted with defendants to have defendants ship a certain display (the "Display") to Texas for exhibit at a trade show.

7. At the time that Manchester arranged for the delivery of the Display to defendants, the Display was in good condition.

8. At the time that defendants delivered the Display to the trade show in Texas, the Display had suffered damage amounting to $10,000. None of said damages were caused as a result of an occurrence which would exempt defendants from liability for said damage pursuant to 49 U.S.C. Section 20(11).

Plaintiff is informed and believes, and thereon alleges, that the damages to the Display were caused as a result of defendants' negligence and/or carelessness.

9. On or about April 8, 1983, Manchester made a claim (the "Claim") to defendants to pay for the damages caused to the Display. Said claim complied with all the requirements for said claims promulgated by the Interstate Commerce Commission.

10. Defendants have failed and refused to pay said damages.

## SECOND CAUSE OF ACTION

### (For Breach of Contract)

For a second and separate cause of action against defendants, and each of them, plaintiff alleges:

11. Plaintiff realleges and incorporates by reference herein, each and every allegation set forth and contained in paragraphs 1 through 10, inclusive, of this Complaint.

12. In or about mid-1982, plaintiff and defendants entered into an oral agreement (the "Agreement") pursuant to which defendants agreed that, as consideration for plaintiff's using defendants to ship plaintiff's goods, defendants would agree to the following claims policy for damages caused to plaintiff's goods during transit which damages exceeded $100: plaintiff would file a claim with defendants for said damages and, if defendants did not reject said claim within a reasonable period of time, defendants would honor said claim. (Said claims policy shall hereinafter be referred to as the "Claims Policy".)

13. On or about April 8, 1983, plaintiff presented the Claim to defendants for the damages to the Display.

14. Defendants never rejected the Claim and more than a reasonable amount of time has passed since the Claim was presented to defendants.

15. As a result of the foregoing, defendants have breached the Agreement.

16. Plaintiff has performed all conditions and covenants of the Agreement required on its part to be performed except those which have been excused by agreement of the parties and/or operation of law.

17. As a result of the foregoing, plaintiff has been damaged in the sum of $10,000 together with interest thereon at the legal rate commencing April 8, 1983.

## THIRD CAUSE OF ACTION

### (For Fraud)

For a third and separate cause of action against defendants, and each of them, plaintiff alleges:

18. Plaintiff realleges and incorporates by reference herein, each and every allegation set forth and contained in paragraphs 1 through 10, inclusive, and 12 through 16, inclusive, of this Complaint.

19. At the time that defendants advised plaintiff of the Claims Policy, which representation was made by defendants' representative, Ms. McKenzie, at Chatsworth, California in or about mid-1982, defendants had no intention of complying with the Claims Policy and knew that the representation concerning the Claims Policy was false. The true facts were that defendants did not intend to automatically honor any

claim in excess of $100 made by plaintiff for damages caused to plaintiff's goods while they were being shipped by defendants in the event that defendants did not deny said claim within a reasonable period of time.

20. Plaintiff relied on the representation that defendants would honor the Claims Policy when plaintiff entered into the Agreement and during the period that plaintiff used defendants to ship plaintiff's goods. During said period of time, plaintiff was defendants' largest customer out of defendants' Simi Valley shipping terminal.

21. Had plaintiff known that said representation regarding the Claims Policy was false, it would not have entered into the Agreement. Plaintiff reasonably relied on the representation that defendants would honor the Claims Policy because plaintiff had no reason to believe that defendants would not be honest with plaintiff.

22. As a result of the foregoing, plaintiff has been damaged in the sum of $10,000.

23. Plaintiff is informed and believes, and thereon alleges, that in doing the acts and things herein alleged, defendants acted wilfully, wantonly and maliciously and with a conscious disregard for the rights of plaintiff and in order to induce plaintiff into using defendants to ship plaintiff's goods. As a result thereof, plaintiff is entitled to exemplary or punitive damages against defendants in the sum of $15,000.

WHEREFORE, plaintiff prays the Court for judgment as follows:

As To Plaintiff's First Cause Of Action:

1. For general and special damages according to proof;

2. For plaintiff's costs of suit incurred herein; and

3. For such other and further relief as is just and appropriate.

As to Plaintiff's Second Cause Of Action:

1. For general damages of $10,000;

2. For plaintiff's costs of suit incurred herein; and

3. For such other and further relief as is just and appropriate.

As To Plaintiff's Third Cause Of Action:

1. For damages in the amount of $10,000;

2. For punitive damages in the amount of $15,000;

3. For plaintiff's costs of suit incurred herein; and

4. For such other and further relief as is just and appropriate.

Plaintiff remits the amount of any judgment in excess of the jurisdictional limits of this Court.

RAISKIN & REVITZ
A Partnership of
Professional Corporations
By: STEVEN J. REVITZ
*Attorneys for Plaintiff, Manchester Products Company*